BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

IRIS KAY (JOERG) ZIMMER	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,540
M-C INDUSTRIES, INC.	)	
Respondent	)	
AND	)	
	)	
MARYLAND CASUALTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant filed an Application For Review before the Appeals Board requesting review of an Award entered by Administrative Law Judge Bruce E. Moore on December 1, 1995. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Tim W. Ryan of Clay Center, Kansas. Respondent and its insurance carrier appeared by their attorney, Mickey W. Mosier of Salina, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requested Appeals Board review of the following issues:

(1) Nature and extent of claimant's disability.

(2) Whether claimant was temporarily and totally disabled from August 8, 1993 through January 4, 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) The parties, before the Administrative Law Judge, stipulated to all of the essential elements of a workers compensation case, except for the amount of claimant's permanent partial general disability benefits. The parties stipulated to a date of accident of April 19, 1993. The claimant sought permanent partial disability benefits based on the work disability test contained in K.S.A. 1992 Supp. 44-510e(a). On the other hand, the respondent argued the claimant was only entitled to permanent partial general disability benefits based on functional impairment, claiming the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) applied. The Administrative Law Judge limited claimant's recovery to permanent partial disability benefits based on her percentage of permanent functional impairment. He found the facts of this case were analogous with the Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) case. The Administrative Law Judge concluded the claimant voluntarily terminated her employment with respondent without requesting further accommodations. Accordingly, the Administrative Law Judge held that such voluntary termination was essentially a refusal to engage in accommodated work. He then entered an award limiting the claimant to an 8 percent permanent partial disability based on the stipulated 8 percent permanent functional impairment rating.

The Appeals Board disagrees with the Administrative Law Judge and finds, for the reasons set forth below, that claimant is entitled to permanent partial disability benefits based upon the percentage of work disability as determined by K.S.A. 1992 Supp. 44-510e(a).

The claimant developed bilateral carpal tunnel syndrome while performing repetitive job duties while employed by the respondent. Respondent first provided claimant with medical treatment through the local company physician, Duane L. Scott, M.D. Dr. Scott provided conservative treatment in the form of physical therapy and medication. He diagnosed bilateral carpal tunnel syndrome and took claimant off work from April 19, 1993, until July 19, 1993. In a letter dated July 17, 1993, to Ramona Robertson, respondent's personnel manager, Dr. Scott, released claimant to her regular work of making bracelets for half a shift (five hours) for a period of one week. Dr. Scott also suggested that claimant rotate her work activities from bracelets to sewing during the first week of her return to work. The doctor concluded that claimant had reached maximum conservative treatment

but if she suffered reoccurring symptoms, he would suggest a nerve conductive study and then possible surgical intervention.

Claimant testified she returned to her regular employment on the night shift working Monday through Thursday for one-half of a shift. She returned to making bracelets which required her to perform repetitive activities well in excess of 250 movements per hour. Claimant testified, after the first night, she complained to the night shift manager and her immediate supervisor that she could not handle the repetitive activities.

Claimant was asked on direct examination, during the regular hearing, whether or not she requested a transfer when she returned to work in July and August of 1993. Claimant replied:

> "Nightly. I would go in bracelets was the main running faction of that plant at that time. Other sections were open but very few people working in them. They would-- you come in. You get your work orders. They say go to bracelets. I would say could I not please go to inspection, sewing, anywhere because I cannot handle the bracelets."

Claimant returned to Dr. Scott on July 22, 1993, and as a result of that examination, Dr. Scott wrote the respondent's personnel manager a note dated July 22, 1992, which stated that claimant's arm was swollen and the restriction to one-half-day shift was extended by him through August 6, 1993.

Finally, because her repetitive job duties continued to make her hands worse, claimant delivered a resignation letter to respondent's personnel manager, Ramana Robertson, on August 9, 1993. In that letter claimant indicated she was resigning because she could not perform the repetitive job duties without aggravating her injured hands.

The respondent argues that if claimant would have requested an accommodated job the respondent would have provided the accommodation. Ms. Robertson testified that if claimant would have made such a request she could have transferred to the day shift where there were more non-repetitive jobs available. However, Ms. Robertson also testified she did not talk to the claimant when she received her resignation letter and further she did not offer claimant another job.

After claimant terminated on August 9, 1993, the respondent's insurance carrier had claimant examined and treated with orthopedic specialist, J. Mark Melhorn, M.D., in Wichita, Kansas, on October 19, 1993. Dr. Melhorn had EMG and NCT tests conducted which had positive results. The doctor then diagnosed claimant with bilateral carpal tunnel syndrome. He treated claimant conservatively and because she did not respond to this treatment regimen, he gave her the choice of surgical releases. After explaining the benefits and the disadvantages of the surgical intervention, claimant declined surgery. Dr. Melhorn released claimant on January 4, 1994, with permanent restrictions of

maximum lift and carry of 35 pounds; frequent lift of 20 pounds; limited pushing, pulling, fine manipulation, vibratory and power tools to six hours per eight hour day with the limit of 250 repetitions per hour. The doctor rated the claimant in accordance with the Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised) for an 8 percent whole body permanent functional impairment.

At the time of the regular hearing, claimant remained symptomatic and was working part-time one to two days per week earning $5.25 per hour answering the telephone and writing up sales tickets for another employer. Respondent argued and the Administrative Law Judge agreed that the presumption of no work disability should apply because the claimant failed to request from the respondent an accommodated job. *See* K.S.A. 1992 Supp. 44-510e(a). Therefore, the respondent argues the public policy considerations announced in Foulk apply and the claimant is only entitled to her permanent functional rating.

First, the Appeals Board finds that in Foulk the claimant refused to even attempt to perform the comparable wage job offered by the respondent that was within claimant's permanent restrictions. Here, the claimant attempted to return to a job offered by the respondent after her injury that did not pay a comparable wage because the claimant was restricted to working only five hours per day. Claimant's testimony is uncontradicted that she notified both her immediate supervisor and the night shift manager that she could not do the job and requested to be transferred to a job she could perform that was not as repetitive. Additionally, claimant's resignation letter specifically notified Ramona Robertson, respondent's personnel manager, that she had to resign because the repetitive work activities aggravated her injury and made her symptoms worse. Additionally, the job claimant was returned to violated the permanent restrictions that were later placed on her by Dr. Melhorn as it exceeded 250 repetitions per hour.

Because claimant was not offered a job she could perform within her restrictions at a comparable wage, the Appeals Board finds the argument of the respondent and the conclusion of the Administrative Law Judge that the facts of this case are analogous to Foulk are misplaced. The Appeals Board finds the claimant is entitled to permanent partial disability benefits based on work disability

The claimant presented the only evidence on the issue of work disability. Monty Longacre, vocational expert, interviewed the claimant on April 17, 1994. At that time, he also had the benefit of Dr. Melhorn's medical records including the permanent restrictions the doctor had placed on claimant upon her release on January 4, 1994. Mr. Longacre applied claimant's permanent restrictions to her preinjury labor market and opined that claimant had loss 71 percent of her ability to perform work in the open labor market. In regard to claimant's loss of ability to earn a comparable wage, Mr. Longacre opined the loss was 11 percent. Again, this evidence was uncontradicted by the respondent and the record does not show the evidence was untrustworthy or untruthful. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded, absent a

showing that it is untrustworthy. *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). Therefore, the Appeals Board adopts Mr. Longacre's opinions on the issue of work disability and finds that both opinions should be weighed equally, entitling the claimant to a 41 percent work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(2) Claimant makes a claim for temporary total disability benefits from August 8, 1993, until she was released with permanent restrictions from Dr. Melhorn on January 4, 1994. During that period of time, claimant asserts she was rendered completely and temporarily incapable engaging in any type of substantial and gainful employment as defined in K.S.A. 1992 Supp. 44-510c(b)(2). The Administrative Law Judge found claimant was not temporary total disabled for that period of time.

The Appeals Board agrees with the Administrative Law Judge but for different reasons. The Appeals Board finds claimant was not able to perform the repetitive job offered by the respondent, however, Dr. Melhorn's testimony did not indicate claimant was incapable of performing any substantial and gainful employment during that period. The Appeals Board interprets Dr. Melhorn's testimony to indicate he essentially placed the same restrictions on claimant after he first examined her on October 19, 1993, that he did after treatment and after her release on January 4, 1994. Accordingly, although claimant had limitations placed on her work activities, those limitations did not render her incapable of performing any type of employment.

All other findings and conclusions of the Administrative Law Judge set forth in his award that are not inconsistent with the above are adopted by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated December 1, 1995, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Iris Kay (Joerg) Zimmer, and against the respondent, M-C Industries, and its insurance carrier, Maryland Casualty Insurance Group, for an accidental injury which occurred on April 19, 1993, and based upon an average weekly wage of $190.

Claimant is entitled to 14.35 weeks of temporary total disability compensation (which includes 2.71 weeks of temporary partial disability converted to 1.35 weeks of temporary total disability) at the rate of $126.67 per week or $1,817.71 followed by 400.65 weeks of permanent partial disability compensation at the rate of $51.93 per week or 20,805.75 for

a 41% permanent partial general disability based on work disability, making a total award of $22,623.46.

As of April 20, 1997, there is due and owing claimant 14.35 weeks of temporary total disability compensation at the rate of $126.67 per week or $1,817.71, followed by 194.51 weeks of permanent partial disability compensation at the rate of $51.93 per week in the sum of $10,100.90 for a total of $11,918.61, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $10,704.85 is to be paid for 206.14 weeks at the rate of $51.93 per week, until fully paid or further order of the Director.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tim W. Ryan, Clay Center, KS
Mickey W. Mosier, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director